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STATUTES:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

BLOUNT BROTHERS CONSTRUCTION COMPANY, *Petitioner,*

v.

J. P. GREATHOUSE STEEL ERECTORS, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Blount Brothers Construction Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix A., *infra,* pp. 1a-3a), is reported at 374 F.2d 324.

JURISDICTION

Jurisdiction of the trial court was based upon 11 District of Columbia Code § 521 and the United States Arbitration Act, Title 9 U.S.C. Jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291. The judgment of the Court of Appeals was entered on February 8, 1967. A petition for rehearing filed on February 21, 1967, was denied on March 14, 1967. Jurisdiction of this Court is based upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 11 of the United States Arbitration Act, Title 9, U.S.C., is set forth in Appendix B., *infra*, p. 4a.

QUESTIONS PRESENTED

1. Where an arbitration award is valid on its face, although unexplained (in accordance with the practice of the American Arbitration Association), may a court of appeals presume that the arbitrators must have exceeded their authority, and, based upon that presumption, vacate the award?

2. Where a party submits a breach of contract claim to arbitration pursuant to a written submission agreement, and agrees expressly to abide by the award, is that party entitled to assert a post-award challenge to the authority of the arbitrators to decide breach of contract questions?

3. Where a court of appeals reverses a judgment confirming an arbitration award and vacates the award solely on the ground that the arbitrators exceeded their authority, should the cause be remanded to the district court for trial, or for resubmission to arbitration?

STATEMENT OF THE CASE

Petitioner, under contract with the District of Columbia to build certain roads, bridges and related structures, entered into a subcontract with respondent for the erection of reinforcing steel (The subcontract is set out in full in the record at R. 5-12). The subcontract contained an arbitration provision which provided for arbitration should "any question of fact" arise under the contract (Article XIII of the subcontract, R. 11). Respondent commenced work under its subcontract, but in September, 1962, informed petitioner that it was unable to continue work because of financial difficulty (R. 18); respondent simultaneously abandoned the work. Petitioner thereupon terminated respondent's employment (R. 17), completed respondent's work, and, pursuant to explicit contractual provisions (subcontract, Article XV(a)3, Article XV(b); R. 11), charged respondent with the resulting cost (R. 19).

On October 6, 1964, respondent filed suit in the United States District Court for the District of Columbia, seeking breach of contract damages in the amount of $21,130.75 from petitioner; a second amended complaint was filed March 9, 1965 (R. 1). Petitioner moved to enforce the arbitration agreement in the contract (R. 13); the trial court granted the motion and ordered arbitration of "all matters in dispute which are subject to arbitration under the contract" (R. 20).

The parties thereupon agreed to proceed to arbitration under the rules of the American Arbitration Association (which differed from the arbitration procedures provided in the subcontract). Pursuant to those rules, the parties executed a formal Submission to

Arbitration wherein each party set forth the issues being submitted to arbitration. (This submission was reproduced as an appendix to the petition for rehearing below (R. 36); it is also set forth in Appendix C hereto.) Respondent's claim was that petitioner breached its contract with respondent; petitioner's claim was for the costs incurred in completing respondent's work.

In the arbitration proceedings respondent made no objection to the authority of the arbitrators, but rather presented and argued its breach of contract claim against petitioner seeking the same amount of money damages it sought in its complaint.

After conducting a hearing and receiving briefs and reply briefs, the arbitrators rendered a unanimous award, on the award form of the American Arbitration Association, providing that respondent pay petitioner $50,000 plus an attorney's fee of $4,400 and costs (R. 21). Petitioner moved the trial court to confirm the award (R. 22); respondent moved to vacate on the ground that the arbitrators exceeded their authority by deciding a breach of contract question (R. 23). The trial court denied respondent's motion, granted petitioner's motion, and entered judgment on the award in accordance with its terms on January 27, 1966 (R. 24).

On February 24, 1966, respondent filed its notice of appeal (R. 25). The case was argued on October 21, 1966; on February 8, 1967, the Court of Appeals reversed the judgment, vacated the award, and remanded the cause expressly for a jury trial (Appendix A). Petitioner filed a timely petition for rehearing on February 21, 1967 (R. 32), which was denied on March 14, 1967 (R. 37).

ARGUMENT

The Decision of the Court Below Is in Conflict with the National Policy Favoring Arbitration as Expressed in the United States Arbitration Act and in Decisions of this Court.

The decision of the Court below has effects which are not limited to the immediate parties; it will adversely affect the future use of arbitration in this country, both labor [1] and commercial arbitration, contrary to the ". . . .clearly established national policy to encourage the use of arbitration . . . [which] is manifest in the statutory expressions of the Congress, 29 U.S.C. § 173(d); 9 U.S.C. §§ 3 and 4 . . . [and] in recent opinions of the United States Supreme Court", *Rhine* v. *Union Carbide Corporation* (6th Cir. 1965), 343 F. 2d 12, 16. In *Wilko* v. *Swan* (1953), 346 U.S. 427, it is said, at 431:

> "The United States Arbitration Act establishes by statute the desirability of arbitration as an alternative to the complications of litigation. The reports of both Houses on that Act stress the need for avoiding the delay and expense of litigation. . . ."

The award under review was rendered after a one-day hearing, a ". . . speedy and relatively inexpensive trial before [construction] specialists." *Oregon-Pacific Forest Products Corp.* v. *Welsh Panel Co.* (D. Ore.

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[1] Labor and commercial arbitration have differing functions, *United Steelworkers* v. *Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 578, but the same substantive rules of law apply to both; this Court has consistently cited commercial and labor arbitration decisions concurrently in referring to the substantive law of arbitration. See e.g. *Atkinson* v. *Sinclair Refining Co.* (1962), 370 U.S. 238, 244, fn. 4; *Republic Steel Corporation* v. *Maddox* (1965), 379 U.S. 650, 664, fn. 6 (dissenting opinion)

1965), 248 F.Supp. 903, 909. In contrast, another trial before a jury of laymen will not be heard for months or years, will be repetitious, will take several days of the trial court's time, is subject to further appeal, and will add to the congestion of court calendars. Thus the decision below vacating the award and remanding for a jury trial tends to frustrate the ". . . liberal policy of promoting arbitration . . . to help ease the current congestion of court calendars." *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.* (2d Cir. 1959), 271 F.2d 402, 410, cert. dismissed (1960), 364 U.S. 801.

The Decision of the Court Below Is in Conflict with Applicable Decisions of this Court Which Hold that Arbitrators Are Not Required To Explain Their Awards

The error of the Court below seems to be founded in the fact that the arbitrators' award was unexplained. The Court below animadverted to this fact three times in the course of its short opinion:

> "*The arbitrators made no* findings of fact, conclusions of law, or other *explanation of their award.*"
>
> "Appellee does not dispute this, but contends that no questions of law were involved in *the unexplained award* which the arbitrators made."
>
> "If *the unexplained award* of the arbitrators had any rational basis, they must have decided questions of law."
>
> (all at 374 F.2d 325, Appendix A, pp. 2a-3a) (Emphasis added)

Reiteration of the fact that the award was unexplained makes the Court's meaning clear. The Court below holds, in effect, that an arbitration award must

be explained; if not explained, the usual presumption in favor of the validity of the award, *Burchell* v. *Marsh* (1855), 17 How. 344, 58 U.S. 344, 350, will be reversed, and the usual burden of proof on the party attacking the award, *American Almond Products Co.* v. *Consolidated Pecan Sales Co.* (2nd Cir. 1944), 144 F.2d 448, 450, will be shifted.

This decision is in conflict with applicable decisions of this Court, for it is clear that ". . . [arbitrators'] award[s] may be made without explanation of their reasons and without a complete record of their proceedings." *Wilko* v. *Swan* (1953), 346 U.S. 427, 436. "Arbitrators . . . need not give their reasons for their results . . .". *Bernhardt* v. *Polygraphic Co.* (1956), 350 U.S. 198, 203.

The Court below found ambiguity in the unexplained award, and so reversed; this is obvious error as a matter of substantive arbitration law, for it is clear that even if the arbitrators had given reasons for their award, and even if there had been ambiguity in the stated reasons, the award could not have been set aside for that reason. Mr. Justice Douglas, speaking for the Court in *United Steelworkers* v. *Enterprise Corp.* (1960), 363 U.S. 593, said at 597-598:

> "The opinion of the arbitrator in this case . . . is ambiguous. It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission . . . [but] mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. *Arbitrators have no obligation to the court to give reasons for an award.*" (Emphasis added).

Surely if ambiguity in an opinion accompanying an award is insufficient to vacate the award, presumed ambiguity arising from the lack of an opinion is a less tenable reason for vacating an award; yet this is the basis for the decision of the Court below.

The Decision of the Court Below Is in Conflict with a Controlling Decision of This Court Which Holds that Every Presumption Is in Favor of the Validity of an Arbitrator's Award

Dereliction on the part of the arbitrators is not apparent on the face of the award, for it is unexplained (being on the standard form of the American Arbitration Association, under whose practice arbitrators do not normally give reasons for their award). Therefore, in order to find it invalid, it was necessary for the Court below to infer or presume that the arbitrators exceeded their authority. The Court below did just this, for the opinion states, 374 F.2d at 325 (Appendix A, p. 3a):

> "If the unexplained award of the arbitrators had any rational basis, they *must* have decided questions of law." (Emphasis added)

In so presuming the Court below erred, for its action is contrary to the mandate expressed in *Burchell* v. *Marsh* (1855), 17 How. 344, 58 U.S. 344, that a reviewing court should indulge every presumption in favor of an arbitrator's award, and should not presume that the arbitrators exceeded their authority.

In both *Burchell* v. *Marsh* and the instant case the arbitrators' award was for the lump-sum payment of money; in both cases the award was unexplained; in both cases the losing party asked the reviewing court to presume that the arbitrators exceeded their author-

ity. The Court below did so presume, but this was error, for in *Burchell* v. *Marsh* it is said, at 58 U.S. 350:

> "Every presumption is in favor of the validity of the award . . . it cannot be inferred that the arbitrators went beyond the submission, merely because they may have admitted illegal evidence about the subject matter of it."

Despite its age, the rule enunciated in *Burchell* v. *Marsh* is still very much alive today; see, e.g., *Shahmoon Industries, Inc.* v. *United Steelworkers* (D. N.J. 1966), 263 F.Supp. 10, 14, and *Nickals* v. *Ohio Farmers Insurance Company* (N.D. Cal. 1965), 237 F.Supp. 904, where it is said at 906:

> "The law favors arbitration and it has long been an accepted principle of law, with respect to review by a court of an arbitration award, that there exists a strong presumption favoring the validity of the award. Burchell v. Marsh, 17 How. 344, 58 U.S. 344, 350, 15 L. Ed. 96."

The Decision of the Court Below Is in Conflict with Decisions of Other Courts of Appeals Which Hold that a Party Waives the Restrictions of a Limited Arbitration Clause by Submitting to Arbitration Issues Outside the Scope of Such a Clause

The subcontract between the parties provided for arbitration "'if any question of fact shall arise under this Contract . . .'". Since even respondent does not contend that there were no questions of fact, the contract required an arbitration in any event. It may be fairly debatable whether on such an arbitration the arbitrators would necessarily be limited to considering the questions of fact which triggered the arbitration. Even if they would, however, in the arbitration

proceedings here *respondent elected not to stand on this restriction, but chose to submit to arbitration its breach of contract claim against petitioner:*

> "Greathouse contends that Blount breached the contract between the parties . . . and claims the amount of $21,130.75 . . ."[2]

Despite this fact the Court below held, contrary to decisions of other courts of appeals, that respondent's submission of a breach of contract claim did not preclude respondent from challenging, *after* the rendition of the award, the authority of the arbitrators to decide breach of contract questions.

By vacating the award on this ground the Court below sanctioned a practice which effectively nullifies arbitration as a desirable alternative to litigation: it permitted respondent to submit its claim to arbitration, gamble on a favorable outcome, but then challenge the authority of the arbitrators when the outcome was unfavorable.

The rule is well established that by submitting to arbitration issues outside the scope of a limited arbitration clause a party waives the restrictions of such a clause. In *Ficek* v. *Southern Pacific Company* (9th Cir. 1964), 338 F.2d 655, cert. denied (1965), 380 U.S.

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[2] Respondent's statement of the claim it was submitting to arbitration, as set forth in the submission agreement executed by the parties (R. 36, Appendix C). In contrast, petitioner merely contended that the cost to petitioner of completing respondent's work, *within* the contract, was $157,742.38 (R. 36, Appendix C); the contract provided that "Should Subcontractor at any time breach this agreement *or fail to prosecute the said work* . . .", then the Contractor should have certain options, including the one exercised, namely, completion of the work for the subcontractor's account. (Subcontract Art. XV, R. 11).

988, the specific question was considered at length, at 338 F.2d 656-657:

> "It is true that arbitration is a matter of contract, and that one is bound by an award only if he agreed to submit the issue to arbitration. But an agreement to arbitrate a particular issue need not be express—it may be implied from the conduct of the parties. Ficek concedes that the precise issue which he now seeks to litigate was in fact submitted to the arbitrators. Even if the initial arbitration clause was not broad enough to include Ficek's claim, by voluntarily submitting the dispute to arbitration, Ficek and the railway 'evinc[ed] a subsequent agreement for private settlement which would cure any defect in the arbitration clause.' Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 809 (2d Cir. 1960). See also, York & Cumberland R. R. v. Myers, 59 U.S. (18 How.) 246, 253, 15 L.Ed. 380 (1855); Mutual Benefit Health & Acc. Ass'n. v. United Cas. Co., 142 F.2d 390, 394 (1st Cir. 1944).
>
> "The rule is sometimes stated in terms of waiver: A claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrators to act. Woolley v. Eastern Air Lines, Inc., 250 F.2d 86, 91 (5th Cir. 1957); Symposium, 58 Nw.U.L.Rev. 521, 523 n. 13 (1963); Anno., 24 A.L.R.2d 752, 759 (1952). See also, United Steelworkers v. Northwest Steel Rolling Mills, Inc., 324 F.2d 479, 482 (9th Cir. 1963); Bower v. Eastern Airlines, 214 F.2d 623, 626 (3rd Cir. 1954); Michel v. Louisville & N.R. Co., 188 F.2d 224, 227 (5th Cir. 1951).
>
> "Ficek's suggestion that the subject matter 'jurisdiction' of the arbitrators could not be enlarged by the conduct of the parties misapplies

> the analogy—the authority of the arbitrators, unlike that of a court, was rooted in the parties' consent."

Respondent may contend that the above-stated rule is inapplicable in that respondent did not submit to arbitration voluntarily but was compelled to arbitrate by court order. This possible contention is without merit for Ficek was also compelled to arbitrate, by the force of federal labor law. *Republic Steel Corporation* v. *Maddox* (1965), 379 U.S. 650; and compare *Philadelphia Dress Joint Board* v. *Rosinsky,* (E.D. Pa. 1955) 134 F.Supp. 607, 610, aff'd, (1956) 229 F.2d 438, where a similar result was reached under a court-ordered arbitration. *The point is that neither Ficek nor respondent was compelled to submit to arbitration the specific issues which each elected to submit.* Each could have reserved his rights by objecting to the authority of the arbitrators to hear claims alleged to be outside the scope of the arbitration clause in the contract. Instead each elected to gamble on a favorable outcome, and each lost. The Court of Appeals for the Ninth Circuit, following the universal rule, refused to permit Ficek to relitigate the question which he submitted to arbitration; the decision of the Court below, which has no support in any authority, ancient or modern, permits respondent to try the same issue again in another forum.

The Decision of the Court Below Is in Conflict with Decisions of This Court and of Other Courts of Appeals Which Hold that Partially Invalid Arbitration Awards Should Be Upheld Where the Invalid Portion Is Separable

The award here under review ordered respondent to pay petitioner $50,000 plus $4,400 as attorney's fee, and in addition ordered respondent to bear the costs of the proceeding. Buttressing its main holding, the Court below held that the arbitrators also exceeded their authority with respect to the attorney's fee and the costs, despite petitioner's contention that the award in these respects was expressly in accord, respectively, with the parties' contract and the rules of the American Arbitration Association pursuant to which the proceedings were conducted.

Assuming *arguendo*, however, that the arbitrators did exceed their authority in one or more of these limited respects, the general rule, followed in the decisions of this Court and in decisions of other courts of appeals, is that an award valid in part and invalid in part should stand, where the invalid portion can be clearly separated from the valid portion. Chief Justice Marshall, speaking for the Court in *Lyle* v. *Rodgers* (1820), 5 Wheat. 394, 18 U.S. 394, said at 409:

> "That an award may be void in part, and good for the residue, will be readily admitted . . . ."

In *DeGroot* v. *United States* (1867), 5 Wall. 419, 72 U.S. 419, it is said, at 430:

> "It is, however, not always that an award is invalid because in some respects it exceeds the submission, for it is said that if this part which is in excess can be clearly separated from the remainder which is within the submission, the latter may stand."

The modern decisions are in accord. See *Enterprise Corp.* v. *United Steelworkers* (4th Cir. 1959), 269 F.2d 327, 330, reversed in part on other grounds, *United Steelworkers* v. *Enterprise Corp.* (1960), 363 U.S. 593, and the authorities cited therein.

This rule is, in effect, codified in Section 11 of the United States Arbitration Act, Title 9, U.S.C., which provides for modification or correction of arbitration awards (Appendix B, *infra,* p. 4a). This statute and the foregoing decisions reflect the favored position occupied by arbitration in the eyes of the law, and make it manifest that a reviewing court should exert every effort to uphold arbitration awards to the greatest extent possible.

The Court Below Erred in Remanding the Cause for a Jury Trial

After reversing the judgment and vacating the award, solely on the ground that the arbitrators exceeded their authority, the Court below remanded the cause expressly for a jury trial.

This was error; petitioner submits that even under an arbitration clause restricted to questions of fact petitioner is plainly entitled to have the factual issues in dispute decided by the tribunal selected by the parties in their contract. *Council of Western Electric Technical Employees-National* v. *Western Electric Company* (2nd Cir. 1956), 238 F.2d 892, 897; *Younker Brothers, Inc.* v. *Standard Const. Co.* (S.D. Iowa 1965), 241 F.Supp. 17, 19. The apparently unprecedented action of the Court below in remanding all issues for a jury trial: ". . . deprive[s] the parties of their contractual rights as well as their rights under Title 9, U.S.C." *Younker Brothers, Inc.* v. *Standard Const.*

Co., supra. If the arbitrators exceeded their powers the proper course was either to remand in the usual form—"for further proceedings not inconsistent with this opinion," or for resubmission to the arbitrators under specific instructions. *Harvey Aluminum* v. *United Steelworkers of America* (C.D. Cal. 1967), 263 F.Supp. 488, 495.

CONCLUSION

The decision below is in conflict with the national policy expressed in the United States Arbitration Act, with decisions of this Court, and with decisions of other courts of appeals; and it represents a departure from the accepted and usual course of judicial proceedings. It is a reactionary decision which finds no support in, and indeed is contrary to, prevailing authority.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 12, 1967

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20082

J. P. GREATHOUSE STEEL ERECTORS, INC.,
a corporation, *Appellant*,

v.

BLOUNT BROTHERS CONSTRUCTION COMPANY, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

Decided February 8, 1967

Before Bazelon, Chief Judge, Edgerton, Senior Circuit Judge, and Wright, Circuit Judge.

Edgerton, Senior Circuit Judge: A subcontract between appellee Blount Brothers Construction Company (Blount) as general contractor and appellant J. P. Greathouse Steel Erectors, Inc., (Greathouse) as subcontractor, provided that "If any question of fact shall arise under the contract . . . either party hereto may demand an arbitration . . ." Greathouse quit the job because of disputes between the parties and Blount completed the work Greathouse had begun.

Greathouse sued Blount for breach of contract and demanded a jury trial. Instead of filing an answer, Blount moved for an order "directing plaintiff to proceed forth-

with to arbitrate the disputes which have arisen under the contract . . .'' The District Court granted the motion, ordered ''that plaintiff and defendant proceed forthwith to arbitrate all matters in dispute which are subject to arbitration under the contract between them,'' and stayed proceedings in the suit ''subject to the further order of the Court upon issuance of the arbitration award.''

Greathouse claimed $21,130.75 from Blount in the arbitration proceedings and Blount claimed $157,742.38 from Greathouse. The arbitrators held a hearing and made an award that Greathouse pay Blount $50,000, plus an attorney's fee of $4,400, and also pay the entire expense of the arbitration. The arbitrators made no findings of fact, conclusions of law, or other explanation of their award. The court denied Greathouse's motion to vacate the award, granted Blount's motion to confirm it, and entered judgment on the award.

As we understand the subcontract, its arbitration clause covers only questions of fact. Though it provides for the naming of arbitrators, in certain circumstances, by the American Arbitration Association, it does not adopt the provision which the Association's rules recommend that ''Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration . . .'' It seems clear that the parties did not intend, by the narrow language they used instead of the broad language recommended by the Association, to agree to arbitrate claims for breach of contract that involve questions of law as well as fact.

Appellee does not dispute this, but contends that no questions of law were involved in the unexplained award which the arbitrators made. We disagree. Greathouse and Blount charged each other with various breaches of contract. Neither party claimed that it had fully performed the contract. The respective claims involved not only the question what each party had done or failed to do but also

the question which party, if either, as a matter of law was excused for his non-performance by the other's failure to perform. If the unexplained award of the arbitrators had any rational basis, they must have decided questions of law. They thereby exceeded their authority.

The arbitrators exceeded their authority in other respects also. They required Greathouse to pay all the expenses of the arbitration, although the subcontract provided that "Each party shall pay one-half the expense of such reference." They required Greathouse to pay Blount an attorney's fee of $4,400. The subcontract provided that if Blount should employ an attorney "to enforce any provision hereof," Greathouse would pay Blount its reasonable attorney's fee. But what Blount is seeking to enforce is not a provision of the contract. It is an award that is not authorized by the contract.

Accordingly, the District Court should have granted Greathouse's motion to vacate the award, 9 U.S.C. § 10(d) (1964). The judgment is reversed, the award vacated, and the cause remanded for a jury trial.

Reversed and remanded.

APPENDIX B

Title 9 U.S.C., Section 11:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION

SUBMISSION TO ARBITRATION

Blount Brothers Construction Company
J. P. Greathouse Steel Erectors, Inc.

Date: June 10, 1965

The named Parties hereby submit the following dispute to arbitration under the COMMERCIAL ARBITRATION RULES of the American Arbitration Association:

In 1960 and 1961 Blount Brothers Construction Company (Blount) entered into a series of written construction contracts with the District of Columbia Highway Department and one subcontract with Peter Kiewit Sons (dated June 22, 1961) under all of which J. P. Greathouse Steel Erectors, Inc. (Greathouse) was Blount's reinforcing steel erection subcontractor. On September 28, 1962, Greathouse notified Blount that it was abandoning work on the projects in question "due to finances", and the work covered by the Greathouse subcontract was thereafter completed by Blount.

A. Blount contends that its completion of the work was pursuant to express provisions of the subcontract under which it is entitled to be paid for the cost thereof in the amount of $157,742.38, together with reasonable attorneys' fees as also provided in the subcontract.

B. Greathouse contends that Blount breached the contract between the parties by failing to make progress payments in the correct amounts when they were due, and claims the amount of $21,130.75 from Blount. Greathouse further says that Blount's cost of completing the job is unreasonable.

Amount of money involved: $178,873.13.
Number of Arbitrators desired: three
Place of Hearing: Washington, D. C.

We agree that we will abide by and perform any Award rendered hereunder and that a judgment may be entered upon the Award.

Name of Party Blount Brothers Construction Company

Address 79 Commerce Street, Montgomery, Alabama

Signed by FREDERICK A. BALLARD
Frederick A. Ballard

Name of Party J. P. Greathouse Steel Erectors, Inc.

Address Box 22164, Fort Lauderdale, Florida

Signed by IVAN J. SHEFFERMAN
Ivan J. Shefferman, Attorney

SUPREME COURT, U. S.

JUL 11 1967

JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 243

BLOUNT BROTHERS CONSTRUCTION COMPANY,
Petitioner,

v.

J. P. GREATHOUSE STEEL ERECTORS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR J. P. GREATHOUSE STEEL ERECTORS, INC. IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 243

BLOUNT BROTHERS CONSTRUCTION COMPANY,
Petitioner,

v.

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Respondent.

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PRELIMINARY STATEMENT

Petitioner is attempting to establish a case not made and also fails to present the case as it appeared in the court below. As thus viewed, the "questions presented" by petitioner are rhetorical, self-serving postulates.

The single subcontract (R. 5-12)[1] on petitioner's form covered steel erection by respondent, J. P. Greathouse Steel

[1] Refers to pages of Joint Appendix in court below filed here as part of the record by petitioner.

Erectors, Inc., on a number of prime contracts between the District of Columbia, through two of its Departments, and Blount. The subcontract price was an estimated aggregate amount of $119,807.50.

Greathouse instituted suit in the District Court charging Blount with various breaches of the subcontract, including wrongful termination thereof, as well as failure to pay for additional work Greathouse asserted it was not obligated to do under the subcontract. Without filing an answer and counterclaim (as it asserted damages in the amount of $157,742.38 against Greathouse for breach of the subcontract), Blount moved in the District Court (R. 13) to compel arbitration and for a stay pending arbitration. The District Court ordered (R. 20) Greathouse and Blount "to proceed forthwith to arbitrate all matters in dispute which are subject to arbitration under the contract between them, the decision of the arbitrators to be final and binding on the parties," and proceedings in the court action were stayed subject to the further order of the court upon issuance of the arbitration award.[2] The arbitration clause in Blount's form of subcontract was intentionally restricted to questions of fact arising under the subcontract (R. 11).

Blount, a prime contractor experienced on federal government contracts[3], in its arbitration clause (Article XIII,

[2]While Blount moved pursuant to 9 USC, Sections 3, 4 and 6, only Section 3 relates to motion in a pending case and there the statute restricts the court to a stay, if the court is satisfied the issue is referable to arbitration. To compel arbitration, a party seeking it must file an independent proceeding under Section 4, which affords an inquiry into the case and permits a full trial on the issues. Thus, the Act as a whole evinces a concern for due process. Section 6 is without significance here. Neither of the courts below dealt with the differences between Sections 3 and 4.

[3]*Blount Bros. Construction Co. v. United States,* 171 C. Cls. 478, 346 F.2d 962. Appeal of Blount Bros. Construction Co., 60-1 BCA 2634; Appeal of Blount Bros. Construction Co., 60-2 BCA 2662; Appeal of Blount Bros. Construction Co., 61-1 BCA 3055; *United States v. Blount Bros. Construction Co.*, 168 F. Supp. 407.

R. 11), evidently chose the standard form of Federal Government Disputes Clause, with its limited scope, as its model for adaptation and correspondingly rejected the standard American Arbitration Association clause, which if used, would have obviated the court proceedings. In addition to limiting the scope of the arbitration clause, not embracing at all questions of law, Blount specifically reserved in its subcontract (Article XV(e), R. 11) for court action all legal rights and remedies which it had against Greathouse for breach of the subcontract or default thereunder afforded by state or federal law.

The issues Petitioner seeks to raise do not warrant further review by this Court.

1. In view of the foregoing and of the opinion of the Circuit Court of Appeals, it may not be contended by petitioner that the arbitration award was valid on its face, or that the Appellate Court presumed the arbitrators exceeded their authority and, simply upon that presumption, vacated the award.

In *United States v. Utah Mining and Construction Company*, 384 U.S. 394, 16 L. Ed. 2d 642, 86 S. Ct. 1545, this Court, after exhaustive review of the cases and following discussion of the scope of arbitration authority under the restrictive language, "questions of fact arising under this contract," rejected the contention that such language authorized and compelled administrative (arbitrative) action concerning all disputes arising between the parties in the course of completing the contract, and held (384 U.S. at p. 412) that the settled construction of such language excluded breach of contract claims from its coverage, whether for purposes of granting relief or for purposes of making binding findings of fact. In such respects, this Court upheld similar views of all of the members of the Court of Claims in Utah.[4]

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[4]The Court of Claims held (168 C. Cls. 522, 526, 339 F.2d 606, 609) that the language "arising under the contract" limited the arbi-

Moreover, the meaning and elements of damages in breach of contract actions concern questions of law. *Prudence Co. v. Fidelity and Deposit Company of Maryland,* 297 U.S. 198, 80 L. Ed. 581, 56 S. Ct. 387.

Arbitration is a matter of contract and a party cannot be compelled to arbitrate any dispute he has not agreed to arbitrate. *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318; *Wiley & Sons v. Livingston,* 376 U.S. 543, 11 L. Ed. 2d 898, 84 S. Ct. 909.

2. The contention made by petitioner and posed as its second question presented that Greathouse in some fashion – apart from the petitioner's motion in the District Court to compel arbitration and that court's order granting Blount's motion, compelling arbitration, and staying Greathouse's suit subject to further order of the court voluntarily and independently submitted to arbitration is without merit and is not even open to Blount, which should be estopped to make it. The award of the arbitrators expressly stated (R. 21) that it was "pursuant to an order of the United States District Court of the District of Columbia, entered April 28, 1965, in Civil Action No. 2635-64, * * *" which was the number of the suit brought by Greathouse in that court. While petitioner has printed the form of submittal used by the parties as Exhibit C to its petition, the record (Exhibit to Blount's petition for rehearing in the Appellate Court) shows that it was on a form of the Association. Moreover, petitioner's contention of voluntary submission was made for the first time in its petition for rehearing.

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tration and jurisdiction authority and did not embrace or include a dispute over a violation of the contract. See also concurring opinion of Judge Davis. Clearly the long-standing court interpretations of the arbitrable scope of "questions of fact arising under this contract" is the reason why the American Arbitration Association chose the language it employs in its standard arbitration clause (R. 15).

3. The final question presented and argued by petitioner ignores the portion of the opinion of the Circuit Court of Appeals (Appendix A to Petition, p. 2a) holding that the narrow language of Blount's own form of arbitration clause excluded agreement to arbitrate legal questions and claims for breach of contract. In *Utah, supra,* this Court so construed such language as constituting the intention of the parties to exclude breach of contract damages claims from the scope and intendment thereof. Here there is not only such restriction and exclusion arising from the use of the language, "questions of fact arising under this contract," but also the express reservation of Blount in Article XV(e) of its standard form of subcontract.

In view of the record in this case and of the action of the arbitrators, the assertion of petitioner that the decision of the Court of Appeals is "reactionary" – whatever that may mean – is a flagrant impropriety. *A fortiori,* is that so in the light of this Court's decision in Utah.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

ARGUMENT

The petition for certiorari points out that the decision of the Court below is *in direct conflict* both with certain arbitration decisions of this Court and with certain arbitration decisions of several other courts of appeals.

Significantly, respondent's memorandum in opposition does not deny the conflict revealed by the petition. Unable to deny conflict in decisions respondent instead

attempts to obfuscate the issue by citing, not arbitration decisions of this Court, but a wholly irrelevant administrative law decision, *United States* v. *Utah Mining and Construction Company* (1966), 384 U.S. 394, concerning the statutorily-limited jurisdiction of an administrative agency created by executive order.

The *Utah* decision occupies 29 pages in the U.S. Reports, and more than fifty administrative law decisions are cited therein, but the word "arbitration" is nowhere mentioned.

The *Utah* decision is simply irrelevant to the issues raised in the petition. It does not reverse or qualify the prior decisions dealing with arbitration awards for the simple reason that it does not deal with arbitration awards. It does not hold that arbitration awards need to be explained; it does not hold that unexplained arbitration awards may be presumed invalid; it does not hold that, in situations dealing with *consensual* as opposed to *statutory* jurisdiction, parties may not waive jurisdictional limitations by their conduct. The decision of the court below does so hold, and in so doing conflicts with applicable decisions of this Court and with applicable decisions of other courts of appeals.

The adverse impact of the broad language of the decision below on the course of arbitration cannot be overstated. Almost all of the thousands of commercial arbitrations handled annually by the American Arbitration Association result in unexplained awards. Many, if not most, of the thousands of labor arbitration awards rendered each year are only partially explained. If the decision below is allowed to stand all of those wholly or partially unexplained arbitration awards are subject to attack by the losing party who need cite only the decision below, with its broad lan-

guage permitting a presumption of arbitrators' infidelity to arise from an unexplained award. In many cases labor arbitration will be largely nullified, for the underlying grievance will continue to fester while the parties, instead of complying with the award, argue in court over the fullness of the explanation accompanying the award, and whether any lack thereof infers a dereliction on the part of the arbitrators.

Whether these attacks in themselves are successful or unsuccessful will be important only to the individual parties to those arbitrations, but arbitration will tend to lose its appeal as a prompt and inexpensive remedial device, and the congestive effect upon the calendars of the various courts will be dramatic. Arbitration will tend to become merely the beginning of litigation, not the substitute for litigation and industrial strife.

CONCLUSION

For the reasons stated in the petition, and for the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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